No. 12,717

IN THE

United States Court of Appeals

For the Ninth Circuit

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellant,

vs.

JOHN MUGAVERO,
Appellee.

OPENING BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Statutes

Rules

No. 12,717

IN THE

United States Court of Appeals

For the Ninth Circuit

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellant,

vs.

JOHN MUGAVERO,
Appellee.

OPENING BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", granting a writ of habeas corpus, which, in effect, directed the discharge of the appellee from the custody of the appellant. (Tr. 68.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A. Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28 U.S. C.A. Section 2253.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below granting the writ of habeas corpus, which, in effect, directed the discharge of the appellee, an inmate of the United States Penitentiary, Alcatraz, California, from the custody of the appellant, the warden of the said penitentiary. (Tr. 68.)

Prior to the institution of the instant proceedings appellee had filed a petition for writ of habeas corpus in the Court below, in case numbered 29017-E (Tr. 73-80), in which, as in the instant proceedings, he contended that he had suffered double punishment for the same offense, and the Court below issued an order to show cause. (Tr. 80.) Thereupon the appellant filed a motion to dismiss the petition on the ground that the appellee had failed to file a motion in the trial Court to vacate, set aside or correct the sentence heretofore imposed against him as required by Title 28 U.S.C.A. Section 2255, and on the further ground that the said petition failed to state a claim upon which relief can be granted (Tr. 81), to which appellee filed a traverse. (Tr. 82-86.) Thereafter the Court below filed a memorandum opinion denying appellant's motion to dismiss (Tr. 87-93, and Appendix I of this brief, and as reported in *Mugavero v. Swope,* 86 Fed. Supp. 45), and, in conformity with the said opinion, entered an order granting appellant time within which to file a Return to Order to Show Cause and Memorandum of Points and Authorities in support thereof. (Tr. 94.) The appellant thereupon filed a Return to Order to Show Cause incorporating his

supporting authorities in the said return. (Tr. 94-97.) The appellee then filed a pleading which he entitled, "Petitioner's Traverse to Respondent's Supplementary Proceedings" (Tr. 97-98) and a supporting memorandum. (Tr. 99-104.) The matter was once more submitted and the Court below then entered an order denying appellee's application for writ of habeas corpus. (Tr. 104-106, and Appendix II of this brief.) The appellee thereupon filed a motion for rehearing (Tr. 106-110), and a motion for permission to supplement the record by the filing of certain testimony received in evidence by the trial Court. (Tr. 111-123.) The motion for rehearing was granted (Tr. 124), but subsequently vacated by the entry of the following order:

"ORDER VACATING ORDER GRANTING MOTION FOR REHEARING

There being some question in the mind of the Court as to its jurisdiction to entertain a motion for rehearing filed more than ten days after the entry of its order denying petition for writ of habeas corpus,

It Is Hereby Ordered that the order granting the motion for rehearing be and the same is vacated and set aside.

The petitioner may file a new petition for writ of habeas corpus, the original order denying petition for writ of habeas corpus being hereby deemed denied without prejudice.

/s/ Herbert W. Erskine,
United States District Judge.

[Endorsed]: Filed May 10, 1950." (Tr. 124.)

Subsequently the instant proceedings, in case numbered 29753, in which appellee was represented by appointed counsel, were instituted by the filing of another petition for writ of habeas corpus to which, among other things, were attached certain extracts from the testimony received in evidence before the trial Court in the case which resulted in his conviction and incarceration. (Tr. 2-41.) Thereafter an order to show cause was issued to which the appellant filed a return, and in this return he incorporated his supporting authorities and also incorporated, by reference, the entire record of the proceedings in the above-mentioned case numbered 29017-E. (Tr. 41-63.) The appellant also filed a motion to strike from the petition certain matters which he considered evidentiary and immaterial and more particularly moved to strike, on the same ground, the extracts of the testimony which, as above mentioned, were attached to the petition. (Tr. 65-67.) Thereupon, the matter having been submitted, the Court below entered the following "Order Granting Writ" which, in effect, as can be readily seen, directed the discharge of the appellee from the custody of the appellant:

> "The writ of habeas corpus is hereby granted for the reasons set forth in the earlier memorandum opinion filed September 23, 1949, denying respondent's motion to dismiss, and on the additional authority of Clawans v. Rives, 104 F. (2d) 240, subsequently brought to the attention of this Court, on the issue of the propriety of habeas corpus to test the claim of double jeop-

ardy. Petitioner will remain in custody, however, pending appeal from this order by respondent.

Dated: July 31st, 1950.

/s/ Herbert W. Erskine,
United States District Judge.

[Endorsed]: Filed July 31, 1950." (Tr. 68.)

From this latter order the appellant now appeals to this Honorable Court. (Tr. 69.)

FACTS OF THE CASE.

The facts leading up to the filing of the instant petition may be found in the decision of the United States Court of Appeals for the Second Circuit in *United States v. DeNormand et al.,* 149 F. (2d) 622, as modified by a correction as set forth in its subsequent opinion in the cases of *Oddo v. United States* and *United States v. DeNormand,* 171 F. (2d) 854, certiorari denied, 337 U.S. 943, in a footnote at page 856, decisions which appellant herein incorporated by reference in these habeas corpus proceedings.

Appellee herein and four others, included among whom were William DeNormand and Joseph Peter Oddo, were convicted in the Southern District of New York on March 9, 1944, on an indictment in nine counts involving two trailer trucks, numbered 3 and 4, and their contents, eight of which counts charged violations of Title 18 U.S.C.A. Section 409*

*See Appendix III.

(now Sections 659 and 2117) and the ninth a violation of the conspiracy statute, Title 18 U.S.C.A. Section 88 (now Section 371). Appellee was sentenced on March 16, 1944 to an aggregate term of 12 years; 5 years on counts 1 and 2, ordered to run concurrently; 5 years on counts 3 to 8, inclusive, ordered to run concurrently, but consecutively to the sentences on counts 1 and 2; and 2 years on count 9, ordered to run consecutively to the other sentences imposed. Each of the first eight counts was based on Title 18 U.S.C.A. 409 and charged that the defendants "unlawfully, wilfully and knowingly did steal, take and carry away from certain trailer trucks of the Rapid Motor Lines, Inc." goods belonging to various shippers or consignees and forming part of an interstate shipment of freight. (Tr. 46-54.)

These convictions were affirmed on May 14, 1945. *United States v. DeNormand, et al.,* supra. On appeal, it was contended, among other things, that even if the proof showed the defendants guilty of unlawfully taking both trucks, their acts constituted only a single crime and hence the imposition of cumulative sentences was illegal. The Second Circuit held that the substantive offense of taking possession of truck 3 and its contents is distinct from that of taking possession of truck 4 and its contents. The acts of taking were distinct, citing *Blockburger v. United States,* 284 U.S. 299 and *United States v. Busch,* 64 F. (2d) 27, certiorari denied, 290 U.S. 627.

Thereafter, and on November 30, 1947, defendant Oddo moved under Rule 35 of the Federal Rules of

Criminal Procedure to vacate as illegal so much of the sentence as rests on counts 3 to 8 of the indictment. The motion was denied on March 15, 1948, and the order of the District Court was affirmed, *Oddo v. United States, and United States v. DeNormand,* supra. Oddo argued that seizure of truck 3 and its contents was a single crime, and similarly the seizure of truck 4 and its contents, and since count 1 covered some of the goods on each truck, the sentence imposed under count 1 was in part for the theft of the contents of truck 4, and the imposition of the additional sentence under counts 3 to 8 was a second sentence for the same offense. (It is this contention which is the basis for appellee's claim for relief in our case at bar.) The movant cited in support of his contention *Robinson v. United States,* 143 F. (2d) 276 and *Kerr v. Squier* (C.C.A. 9), 151 F. (2d) 308. The Second Circuit rejected this contention on the authority of *United States v. DeNormand, et al.,* supra, and *Crespo v. United States,* 151 F. (2d) 44, certiorari dismissed, 327 U.S. 758. The Court further held that the test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count, citing *United States v. Baerman,* 24 Fed. Cases 1065.

Appellee, having completed service of the five-year sentence imposed on counts 1 and 2 and the two-year sentence imposed on count 9, less deductions for good time, attacked by habeas corpus in the Court below the legality of the five-year sentence imposed

on counts 3 to 8, inclusive, contending, as his co-defendant Oddo unsuccessfully did, as above indicated, before the trial Court and the Second Circuit Court, that in serving this latter (five-year) sentence he was suffering double punishment and being twice placed in jeopardy for the same offense. With this contention, contrary to the decisions of the trial Court and the Second Circuit Court, the Court below agreed.

CONTENTIONS OF APPELLANT.

The seven points designated by the appellant as the grounds to be relied on by him on appeal (Tr. 128-129) may be summarized as follows:

1. The defense of double jeopardy is not cognizable in habeas corpus.
2. A Court cannot look outside the face of the record in a habeas corpus proceeding to determine whether a defendant is suffering double punishment and being twice placed in jeopardy for the same offense.
3. The appellee is not suffering double punishment and has not been twice placed in jeopardy for the same offense.

ARGUMENT.

I.

THE DEFENSE OF DOUBLE JEOPARDY IS NOT COGNIZABLE IN HABEAS CORPUS.

As to whether the issue of double jeopardy may be raised in a collateral attack by way of habeas corpus, the Courts are at variance. The order of the Court below entered on December 9, 1949, dismissing the petition for writ of habeas corpus in case numbered 29017-E, pointed out the present differences in this connection which exist in both the Supreme Court and this Honorable Court. The Court below cited *Ex parte Neilsen,* 131 U.S. 176; *Ex parte Bigelow,* 113 U.S. 328; *Johnston v. Lagomarsino* (C.C.A. 9), 88 F. (2d) 86; and *Kerr v. Squier,* supra, wherein the issue was allowed to be raised by habeas corpus. See also *Clawans v. Rives,* 104 F. (2d) 240, cited by the Court below in its subsequent order granting the writ. It then cited *In re Snow,* 120 U.S. 274; *Kastel v. United States* (C.C.A. 2), 30 F. (2d) 687; and *Crapo v. Johnston* (C.C.A. 9), 144 F. (2d) 863, which either hold or infer by *dicta* that the issue may not be raised. The Court below, however, decided the issue before it without ruling on the issue of double jeopardy. Appellant, in view of the conflict which exists relative to this question, respectfully urges this Honorable Court to resolve this issue and, in accordance with the legal principle which limits the function of the writ of habeas corpus to the traditional matters of jurisdiction, constitutional rights of a defendant, and the legality of sentence,

Sunal v. Large, 332 U.S. 174;

U. S. ex rel. Kulick v. Kennedy, 157 F. (2d) 811;

Knewel v. Egan, 268 U.S. 442;

Goto, et al., v. Lane, 265 U.S. 393;

hold that the defense of double jeopardy does not constitute such a traditional constitutional right of a defendant as to warrant relief by way of collateral attack.

II.

A COURT CAN NOT LOOK OUTSIDE THE FACE OF THE RECORD IN A HABEAS CORPUS PROCEEDING TO DETERMINE WHETHER A DEFENDANT IS SUFFERING DOUBLE PUNISHMENT AND BEING TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE.

Assuming, *arguendo,* that the defense of double jeopardy can be raised upon an application for writ of habeas corpus, the law seems to be that in such a collateral proceeding the Court can not look outside the face of the record to determine whether or not there has been a violation of this guarantee. In *McKee v. Johnston,* 109 F. (2d) 273, 275, this Honorable Court, in analyzing its holding in the case of *Johnston v. Lagomarsino,* supra, upon which appellee herein strongly relies, and upon which the Court below largely based its decision, said:

> "* * * It may be assumed, and the assumption is probably warranted by the language of the indictment, that each taking was part of a continuous transaction. However, it does not appear that the takings were simultaneous. Since the record is not before us we are entitled to assume,

> in support of the judgment, that the takings were not simultaneous and that they were selective. Ex parte Yarbrough, Ku-Klux Cases, supra, 110 U.S. pages 653, 654, 48 S. Ct. 152, 28 L. Ed. 274."

Furthermore, in *Kerr v. Squier,* supra, at page 309, the only other case upon which appellee herein relied and upon which the Court below based its decision in ordering the appellee released from the custody of the appellant, this Honorable Court placed its stamp of approval on the rule which it laid down in *McKee v. Johnston,* supra, when, among other things, it asserted:

> "* * * While every presumption must be indulged in favor of the judgment and sentence, Hall v. Johnston, Warden, 9 Cir., 86 F. 2d 820, just decided, but where *upon the face of the record* it is disclosed that the offense charged involved several separate articles, not charged as separately taken, but which may have been simultaneous and continuously taken, a different relation obtains." (Italics supplied.)

Inasmuch as each count of the indictment clearly states a separate offense against the laws of the United States and there is nothing in the judgment to indicate anything to the contrary, it is clear that the record, on its face, shows that the appellee has not suffered double jeopardy, and accordingly it is respectfully submitted he is not entitled to relief by habeas corpus.

III.

THE APPELLEE IS NOT SUFFERING DOUBLE PUNISHMENT AND HAS NOT BEEN TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE.

Aside from the question as to the availability of the defense of double jeopardy in a habeas corpus proceeding and the circumstances, if any, under which the defense is permitted in such a proceeding, the issue now to be considered is whether, as the Court below found, the appellee has been twice placed in jeopardy, and is suffering double punishment, for the same offense. Appellant respectfully asserts a contrary finding should have been made by the Court below.

As indicated herein, appellee's claim for relief, and the finding of the Court below, are based on the decisions of this Honorable Court in *Johnston v. Lagomarsino,* supra, and *Kerr v. Squier,* supra. Appellee argued, and the Court below stated it was compelled to agree, that these decisions are in direct conflict with the holding of the United States Court of Appeals for the Second Circuit in *United States v. DeNormand, et al.,* supra, *and Oddo v. United States* and *United States v. DeNormand,* supra, cases on which appellant herein relies. It should be noted that the *Lagomarsino* and *Kerr* cases arose under the Mail Robbery Statutes, and the *DeNormand* and *Oddo* cases, under the provisions of Title 18 U.S.C.A., Section 409, and that, as was suggested by the United State Court of Appeals for the Second Circuit, there has been no decision squarely in point contrary to

that which it reached in these latter cases. As a matter of fact, in *Oddo v. United States and United States v. DeNormand,* supra, although the Appellate Court referred to the case of *Kerr v. Squier,* supra, it gave no indication that this opinion was directly in conflict with its holding in the earlier *DeNormand* case, when, after mentioning the *Kerr* case, it went on, among other things, to say, at page 856:

> "* * *, we think that under the National Stolen Property Act, 18 U.S.C.A. §409 (now §§659, 2117), the taking of cases of merchandise belonging to different owners and constituting independent interstate shipments, though contained in one vehicle, may be regarded as separate offenses for which separate punishment can be imposed. The intention of Congress, we believe, in enacting §409 was to protect each and every 'interstate shipment' of goods against felonious taking. We said substantially this in considering the somewhat similar contention asserted in the former appeal that the taking of both trucks constituted only a single crime. United States v. DeNormand, 2 Cir., 149 F. 2d 622, at page 625."

Aside from the contentions hereinabove advanced there is one important point, viz., Count 2 of the indictment, which appears to have been heretofore overlooked in a consideration of the matter by the United States Court of Appeals for the Second Circuit, by the Court below in its memorandum opinion as reported in 86 Fed. Supp. 45, Appendix I of this brief, and by the appellant himself in his arguments before the Court below. It is a point which was raised

for the first time by the Government in its memorandum filed in its successful opposition to Oddo's petition for a writ of certiorari, 337 U.S. 943. It is a point upon which appellant herein strongly relies, a point which, if resolved in appellant's favor, will make it unnecessary for this Honorable Court to determine, in light of its opinions in the *Lagomarsino* and *Kerr* cases, supra, whether the United States Court of Appeals for the Second Circuit was correct in deciding that one who steals a vehicle containing several shipments or consignments of goods commits as many offenses, under the statute, as there are shipments in the vehicle. The point follows:

It was the manifest intent of the trial judge to impose two cumulative sentences for the thefts of the two trucks and their contents. That intent should be effectuated if it is legally possible to do so. It is legally possible to do so if the concurrent sentences on counts 3 to 8 be treated as running consecutively to the sentence on count 2, rather than count 1. Count 1 related to merchandise on truck No. 3 and truck No. 4. Count 2, which appellee ignored, as did his codefendant, Oddo, and which appellant himself overlooked in the Court below, related exclusively to merchandise on truck No. 3. Counts 3 to 8 related exclusively to merchandise on truck No. 4. (See instant petition, par. XI, Tr. 6.) The concurrent sentences on the latter counts could therefore be validly made to run from the expiration of the sentence on count 2. It is true that the actual sentence pronounced

specified that the concurrent sentences on counts 3 to 8 should run consecutively to the concurrent "sentences" on both counts 1 and 2. But there is no more reason for singling out count 1 as the count at whose expiration the sentences on counts 3 to 8 should commence than there is for selecting count 2 for that purpose. Appellee, in order to defeat the intent of the trial judge, chose to ignore count 2 and regard the concurrent "sentences" on counts 1 and 2 as being the same thing as a single sentence on count 1. Appellant submits that, by regarding the sentences on counts 3 to 8 as running consecutively to that one of the first two counts which involved only goods on truck No. 3, viz., count 2, and ignoring count 1 for present purposes, appellee's objections to the sentence received are overcome and, more importantly, the trial judge's clear intent to sentence appellee to ten years' imprisonment on the substantive counts is preserved. "The Constitution does not require that sentencing be a game in which a wrong move by the judge means immunity for the prisoner."

Bozza v. United States, 330 U.S. 160, 166-167.

Accordingly the appellee is in no position to complain that he is suffering double punishment, and has been twice placed in jeopardy for the same offense.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below should be reversed and the case remanded with directions that it enter a judgment denying the appellee the relief for which he prayed.

Dated, San Francisco, California,
January 8, 1951.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

I.

(Title of District Court and Cause)

"MEMORANDUM OPINION

This is a petition for a writ of habeas corpus. An order to show cause was issued, whereupon respondent replied with a motion to dismiss the petition on the following grounds:—

1. That petitioner has not filed a motion in the trial court to vacate the sentence imposed as per 28 USCA 2255;

2. That the petition fails to state a cause of action upon which relief can be granted.

(1) Necessity for Motion to Trial Court.

Section 2255 of Title 28 does require such motion to the trial court before a habeas corpus petition will be heard, with the following exception, which is the last clause of section 2255: '* * * unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.' Therefore the question is whether such remedy would be adequate or effective in the instant case.

Petitioner alleges correctly that his co-defendant filed such a petition in the trial court predicated upon the same grounds advanced herein by petitioner. This motion was denied by the trial court, upheld by the Circuit Court of the 2nd Circuit in the case

of Oddo v. United States, 171 F. (2d) 854, a decision which, as will be pointed out below, seems contrary to the decisions of the 9th Circuit on the point. Thus, it seems logical to conclude that a motion by petitioner to the trial court would be ineffective.

The applicability of this last clause of Section 2255 has apparently risen in only two cases. In St. Clair v. Hiatt, 83 F. Supp. 585, petitioner had not complied with the requirement of motion to the trial court prior to bringing of the writ of habeas corpus. However, prior to the effective date of the statute, the petitioner had carried on correspondence with the trial judge, which the latter declared he would treat as a motion to correct the sentences. No appeal was taken from the decision of the trial judge not to correct said sentences. Nevertheless the Court hearing the habeas corpus petition held that there was sufficient compliance with Section 2255.

The most analogous case to the present one is Stidham v. Swope, 82 F. Supp. 931, in which Judge Denman of the Ninth Circuit Court of Appeals granted the petition for the writ despite the failure of the petitioner to move the trial court to vacate the sentence, holding that such a motion was inadequate and ineffective to test the legality of petitioner's detention. He based this holding on the fact that the petitioner in Alcatraz was 1500 miles from the sentencing court, with the attendant expense, time and trouble involved in the motion and the consequent appeal, whether or not the petitioner was personally removed back to the locale of the sentencing court,

and on the fact that the case could be much more summarily disposed of in San Francisco, since the Warden at Alcatraz was easily available. Judge Denman was undoubtedly influenced by the fact the petitioner in that case apparently had valid grounds for asking for release. With that factor in mind it is probably correct to state that the question of whether a motion to the sentencing court would be effective or not depends to a large extent upon our conclusions as to the substantive merits of the petitioner's case.

(2) Substantive Basis for Petition.

Unfortunately, in his petition for dismissal, respondent has chosen to rest his case primarily on the issue of the necessity of motion to the sentencing court, and discusses the subtantive issue only to the point of citing United States v. de Normand, 149 F. (2d) 622, which was the original appeal by petitioner from his judgment of conviction. This, however, does not meet the main objection of petitioner, which is that the decisions of the 9th Circuit are contrary to those of the 2nd Circuit, which decided the de Normand case, and also the case of Oddo v. United States, 171 F. (2d) 854, brought by petitioner's co-defendants, where the exact point under consideration here was decided adversely to the petitioner.

The facts underlying this petition are somewhat as follows.

Petitioner was indicted and convicted on nine separate counts. Count 1 charged the theft from 'cer-

tain trailer trucks' of an interstate shipment of freight consisting of 1005 cases of whiskey. At the trial it was proven that 590 of such cases were in one truck, called truck #3, and 415 in another truck, called truck #4. Counts 3 to 8 charged the theft from 'a certain trailer truck' of an interstate shipment of freight consisting of numerous cases of wine, tomato juice, and so forth. The proof showed that all of the merchandise in counts 3 to 8 were in truck #4. Count 9 charged a violation of the conspiracy statute. Petitioner was convicted on all counts, and was sentenced to 5 years for count 1 and 5 years for counts 3 to 8, and 2 years for count 9, to run consecutively. It might be here noted that truck #4 was a completely closed truck with locked doors.

Petitioner argues here, as did the petitioner in the identical case of Oddo v. United States, supra, that since count 1 covered the goods in truck #3 plus some of the goods in truck #4, and since, therefore, possession actual or constructive of truck #4 was necessary in order to convict under count #1, as found in United States v. de Normand, supra, there was no additional criminal act for which he could be convicted, and that the imposition of the additional five years under counts 3 to 8 was a second sentence for the same offense. In substance, the contention is that a thief who steals a vehicle and its contents commits but one theft, even though the vehicle contains packages of different kinds of goods belonging to different owners.

As the Court pointed out in Oddo v. United States, supra, the question whether the stealing of the goods of different owners at one time and place constitutes several offenses or only one has been much mooted in the courts and has produced divergent answers. That court, the 2nd Circuit, could discover no controlling Supreme Court authority, and decided that counts 3 to 8 charged offenses separate from the crime charged in count 1. The reasoning of that court is based primarily upon the following quoted paragraph:—

'The test of the identity of offenses, when double jeopardy is set up, is whether the evidence sustaining one indictment or count would have proved the other indictment or count. (Citing cases.) Proof that the appellant feloniously took possession of the 415 cases of whiskey belonging to Park & Tilford Corporation in truck #4 and involved in count 1 would not have proved that he feloniously took possession of the different merchandise of different ownership specified in counts 3 to 8.' (171 F. (2d) 854 at 857.)

However, it appears that the court overlooked the important fact that truck #4 was a locked truck and was never moved or tampered with. Therefore, if, as was determined, the petitioner had possession of truck #4 and the 415 cases of whiskey involved in count 1, how could it be held that he did not at the same time and place have felonious possession of the remainder of the merchandise in truck #4? Evidence to support a finding of possession of truck

#4 and of the 415 cases, will also prove possession of the rest of the merchandise, enumerated in counts 3 to 8.

Turning from the facts, for a moment, and the logical difficulties in the opinion of the 2nd Circuit, to the cases in the 9th Circuit, it seems that the latter are contrary, at least in theory, to the Oddo case. Thus in Kerr v. Squier, 151 F. (2d) 308, it was held that three separate counts, charging theft of three mail bags from a post office, justify but one 5 year sentence, and require discharge on habeas corpus of the defendant who had served a five-year sentence on one of such counts, the trial court having found that the bags were simultaneously taken in one transaction. Again in Johnston v. Logomarsino, 88 F. (2d) 86, it was held that a taking of three letters in a simultaneous and single transaction constitutes a single offense, and the petitioner was ordered released upon the service of the first of three sentences for the taking of the letters.

It is difficult for me to distinguish the present case from the reasoning in those two 9th Circuit cases; it would follow that in the instant case there was not only one transaction, but only one act which could not be divided into separate offenses. Since petitioner has served a period of time equal to the sentence imposed for counts 1 and 9, my opinion is that the respondent's petition to dismiss should be denied, without prejudice to respondent's right to

more fully answer the substantive contentions of the petitioner.

Dated: September 22nd, 1949.

/s/ Herbert W. Erskine,
United States District Judge.

(Endorsed): Filed September 23, 1949."

II.

(Title of District Court and Cause)

"ORDER

In a previous memorandum opinion this Court denied a motion to dismiss this petition for a writ of habeas corpus; it was the opinion of this Court at that time that under the facts alleged in the petition the petitioner had been subjected to double punishment for a single offense, on the basis of the rule laid down in Kerr v. Squier, 151 F. (2d) 308, and Johnston v. Logomarsino, 88 F. (2d) 86. In his return to the order to show cause, the respondent advanced several additional arguments in support of his contention that the writ of habeas corpus should not issue.

It is contended that the defense of double jeopardy which in essence is the petitioner's claim, cannot be raised in a habeas corpus proceeding. The decisions on this point, both in the Supreme Court and in the Ninth Circuit are not in harmony.

See:

Ex parte Nielsen, 131 U.S. 176;
Ex parte Bigelow, 113 U.S. 328;
Kerr v. Squier, supra;

and

Johnston v. Logomarsino, supra.

All these cases allow the issue to be raised by habeas corpus petition.

In re Snow, 120 U.S. 274; Kastel v. U.S., 30 F. (2d) 687; Crapo v. Johnston, 144 F. (2d) 863.

The latter cases involve holding or dicta that the issue may not be raised by habeas corpus.

Remaley v. Swope, 100 F. (2d) 31, which poses the issue, but avoids a decision thereon.

It is unnecessary for this court to decide this question, however, since it is an agreement with respondent's further contention that the Court cannot look outside the record to determine whether or not there has been a violation of the constitutional prohibition against double jeopardy. Although no actual holdings to this effect have been brought to the attention of this Court, courts have often implied that such is the rule.

Ex parte Nielsen, 131 U.S. 176, 183;
Kerr v. Squier, 151 F. (2d) 308;
McKee v. Johnston, 109 F. (2d) 273.

In the case at bar the only evidence as to the facts constituting the double jeopardy are those alleged

in the petitioner's complaint or stated in the opinions of the 2nd Circuit in the de Normand and Oddo cases. Since a copy of pertinent portions of the transcript of the original trial have not been filed with this Court, and since the facts constituting the alleged double jeopardy do not appear in either the indictment or the judgment, this Court would have to look outside the record to determine the issue in favor of the petitioner.

It is, therefore, the opinion of this Court that the writ of habeas corpus be and it is hereby denied.

Dated: December 9th, 1949.

/s/ Herbert W. Erskine,
United States District Judge.

(Endorsed): Filed December 9, 1949."

III.

Title 18 U.S.C.A., Section 409 reads in pertinent part as follows:

"Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, * * * with intent to convert to his own use any goods

or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, * * *."